

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ALEX F. KNOWLES,

Plaintiff, Cross-defendant and
Respondent,

v.

ANDREW SCOTT,

Defendant, Cross-complainant
and Appellant;

INTELLIGENT SCM, LLC, et al.

Cross-defendants and
Respondents.

B279562

(Los Angeles County
Super. Ct. No. NC059525)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Affirmed.

Roger N. Behle, Jr, Muhammed T. Hussain, Foley Bezek Behle & Curtis, LLP, for Defendant and Appellant.

David E. Rosen, Murphy Rosen LLP, Howard M. Zelener, for Plaintiff and Respondent.

The trial court assessed \$557,236 in damages against Andrew Scott for embezzling from a company called Intelligent SCM, LLC. Scott appeals, making six diverse arguments. He claims plaintiff Alex Knowles lacked standing to sue Scott in a derivative suit. Scott likewise attacks the trial court's finding that four members of Intelligent signed a written document that changed the company's governance structure. Third, Scott claims that, in various ways, the evidence did not support the damages award. Fourth, Scott complains about the testimony of witness Lew Finkelstein. Fifth, Scott maintains the trial court's charging and foreclosure orders were improper. And sixth, Scott says the trial court mishandled his crossclaim. All these arguments are erroneous. We affirm.

Intelligent was a freight forwarding firm that acted as an agent for international exporters. Scott founded this limited liability company in 2010. Knowles became a member in 2011. Peter Lamy and Graham Burford became members in 2012. After a time, Knowles accused Scott of improper corporate conduct, described below. Knowles sued Scott in a derivative action on behalf of Intelligent. Scott cross-complained against Knowles and added Lamy, Burford, and others as cross-defendants. After a bench trial, the court entered judgment for Knowles and against Scott on September 29, 2016. The court awarded \$557,236 on the derivative claims against Scott, payable to Intelligent. The court also awarded declaratory relief. The court ruled Scott would take nothing on his cross-complaint against cross-defendants Knowles, Lamy, Burford, and Intelligent.

Scott filed a notice of appeal on December 14, 2016. On January 24, 2017, the trial court entered charging and

foreclosure orders against Scott's membership interest in Intelligent, which sold at auction on February 27, 2017. Scott filed a second notice of appeal on March 3, 2017. On June 9, 2017, this court consolidated these appeals as B279562. On March 30, 2017, Scott filed a petition for writ of supersedeas, which this court denied on April 12, 2017.

On December 5, 2017, Knowles moved to dismiss the appeal, which Scott opposed. On December 21, 2017, this court deferred Knowles's motion to the panel deciding the merits. We now deny this motion as moot.

We independently review questions of law but defer to the trial court's factual findings by affirming them when substantial evidence supports them. We review evidentiary rulings for abuses of discretion. The trial court's error in excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a miscarriage of justice—that is, that a different result would have been probable if the error had not occurred. (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317)

I. Knowles had standing to sue derivatively

Scott incorrectly argues Knowles lacked standing to sue Scott in a derivative capacity on behalf of Intelligent. To gain standing to prosecute a derivative action, a company member must exhaust means of redressing the grievances within the company or must establish this effort would have been futile. (Cf. *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 789-791 [corporation rather than limited liability company].) Knowles met this test. Knowles asked Burford and Lamy to sue or to have the company sue Scott, but they declined. Believing it would be futile, Knowles did not ask if Scott would be willing to sue

himself. Scott admitted he would not have authorized such a suit. This showing satisfied the exhaustion and futility requirements.

Scott incorrectly argues Knowles, as a manager of Intelligent, could have authorized Intelligent's direct action. This argument is contrary to Intelligent's operating agreement, which defined the powers of managers. The power to sue for the company is reserved to managers "acting together"; managers acting alone lacked such authority. Scott thus errs in suggesting Knowles alone could have authorized Intelligent to sue Scott.

Under any standard of review, the trial court did not err in permitting Knowles to bring this derivative action against Scott on behalf of Intelligent.

II. Substantial evidence supports findings about Intelligent's governance

On appeal, Scott argues he was the sole authorized manager of Intelligent. This argument challenges the trial court's finding that on February 13, 2014 the four members of Intelligent convened a members' meeting because Knowles, Lamy, and Burford had discovered some of Scott's embezzlement and Knowles had, on February 10, 2014, sued Scott. At the February 13 meeting, Scott emotionally apologized for his conduct. The four worked out a plan to allow Scott to remain with the company. A key component allowed Knowles, Lamy, and Burford to gain control over company operations to end Scott's financial misconduct. The trial court found the meeting produced a number of agreements, including that all four were elected as managers and that the voting rights were changed to one member one vote. These changes were effective immediately.

In return, Knowles dismissed his lawsuit against Scott the next day.

Scott challenges these trial court findings. He claims this corporate action was ineffective because it violated Intelligent's operating agreement, which identified Scott as the sole manager and which required changes to be in a signed writing.

Scott's challenge is invalid. Substantial evidence supports the trial court's finding that on February 13, 2014 the four members properly became four managers of Intelligent.

Before this meeting, Scott was the sole manager of Intelligent. Knowles sued him for looting the company. The suit prompted the meeting, which led to verbal agreements that the four then memorialized in a two-page handwritten summary. The operating agreement required a signed writing, which the four at the meeting created and signed. This writing states, among other items, "All managers." The most reasonable interpretation of these words is that all four members of Intelligent were now managers of Intelligent. That is consistent with the testimony of Knowles, Lamy, and Burford, whom the trial court found to be credible.

Scott disputes neither the authenticity of this document nor the validity of the signatures upon it, including his own. Rather, Scott asserts this meeting "produced no written amendment to the [operating agreement]," but this is inaccurate. The two-page handwritten summary was a sufficient writing signed by all.

Scott claims this agreement was merely an agreement to agree. This interpretation is incorrect because it is reasonable to interpret the words "All managers" as a record of a done deal, which is consistent with the testimony the trial court found credible. The point of the deal was to remedy the immediate and

pressing problem of Scott's embezzlement. As a result, all four at the meeting properly became managers of Intelligent, effective February 13, 2014. This trial court finding is affirmed.

Scott likewise challenges the trial court's finding that on May 27, 2014, after discovering more improprieties and after Scott reneged on the February 13, 2014 agreement, Knowles and the others removed Scott as the manager and CEO of Intelligent. Scott notes the original operating agreement defined a majority vote as a vote by members holding 75% of percentage interests. But the February 13, 2014 amendment stated that it had "revised voting rights." The reasonable interpretation of this text is that "all managers" now had equal votes. When three out of four members voted to remove Scott, his removal was effective. Substantial evidence supports the trial court's finding to that effect.

In a related argument, Scott faults the trial court for excluding a February 28, 2014 e-mail that Scott claims was Knowles's admission that neither he, Lamy, nor Burford were elected managers on February 13, 2014. We need not determine whether this message is within the authorized admission exception to the hearsay rule, as Scott contends, because the e-mail has no bearing on this case. It was not an admission by Knowles or his attorney, but rather an effort to settle a controversy that broke out on the heels of the February 13 meeting. Scott has not demonstrated this e-mail could have changed the trial court's analysis in any way. His reply brief skips this challenge, which Knowles issued in his respondent's brief. This evidentiary complaint is not a valid reason for disturbing the judgment.

III. Substantial evidence supports the damages award.

Scott faults the trial court's determination of damages. Scott makes four arguments, concerning (1) personal expenses, (2) "Qannu," (3) transfers to Scott and his family, and (4) fiduciary breaches that caused no damages. We treat these arguments in that order.

A. Substantial evidence supports the damages award regarding personal expenses

The trial court awarded \$115,161 for Scott's improper use of corporate funds to pay personal expenses. Substantial evidence supports this award. The trial court cited Exhibit 155 as support for this calculation. Exhibit 155 is a 23-page spreadsheet detailing Scott's use of corporate funds for personal expenses. There are over one thousand lines of data in this exhibit, listing such expenses as "holiday with son," "home cable service all channels," "shopping spree," "buying wine for personal use," "NYC holiday," "personal golf with friends," "San Francisco holiday America's Cup," "stocking own wine cellar personal," "airfare for friend's wedding," "buying personal art work," "duty free liquor purchases" "holiday dining," "repair to Range Rover personal," "cleaning Range Rover personal," "Australia holiday," "London holiday," and "European holiday." The vendors included Victoria's Secret, Red Rock Casino Resort, Nordstrom, Hennessey's Tavern, Crystal Auto Spa, and Venice Beach Wines. There were regular payments for "filling Range Rover," "personal dining," "personal drinks," and bills for a "home alarm system."

Scott does not challenge the admission of Exhibit 155, on which the trial court relied and which constitutes substantial support for its ruling. Scott does cite a contrary opinion from his expert Daniel Miller. The cross-examination of witness Miller,

however, was devastating. Scott's redirect consisted of only three questions. The trial court was entitled to interpret this powerful cross-examination and feeble rehabilitation as total destruction of Miller's attempt to contradict Exhibit 155. Moreover, even if Miller had not been devastated by cross-examination, that fact does not affect substantial evidence analysis.

*B. Substantial evidence supports the award regarding
"Qannu"*

The trial court also awarded sums for payments to, transfers to, or receivables withheld by "Qannu." There actually were two entities named Qannu: Qannu (USA), LLC, and Qannu PTY LTD., but we generally follow the parties' practice of referring to both merely as "Qannu," unless the context requires more specificity.

The heart of the Qannu dispute revolved around the question of who owned the Qannu companies. The trial court found Scott was a part owner of Qannu (USA), LLC, while Scott's sister was part owner of Qannu PTY LTD. The court thus found Scott breached his fiduciary duties by improperly funneling funds from Intelligent to Qannu. These actions were improper self-dealing because Intelligent's operating agreement forbade company transactions (like the Intelligent/Qannu actions) in which a member (like Scott) had a "material financial interest" unless disinterested members gave approval. No disinterested member approved of, or for that matter knew about, Scott's Qannu actions.

Scott's defense was that Intelligent owned Qannu and transfers between parent Intelligent and subsidiary Qannu were inconsequential.

Substantial evidence supports the trial court's conclusion that Scott was part owner of Qannu and thus that his Qannu actions were improper self-dealing. Knowles testified Intelligent originally was the sole owner of Qannu, but that Knowles and Scott agreed to change that ownership arrangement when Lamy and Burford joined Intelligent. Knowles and Scott then converted Qannu into an entity that Knowles and Scott jointly owned. Substantial evidence thus supports the trial court's factual conclusion that Scott had an ownership interest in Qannu.

To boot, the trial court specifically endorsed the credibility of Knowles and each of the witnesses he presented. The court did not endorse defense witnesses.

Scott's Qannu transactions thus required but did not get approval. Therefore they constituted improper self-dealing. Substantial evidence supports this finding.

Scott maintains the trial court erred by failing to grant him a \$170,000 offset for Knowles's recovery in a federal lawsuit. Scott does not support this claim. Indeed, his cited record evidence *negates* Scott's claim that this litigation award was a debt recovery from Qannu. Rather than debt recovery, this sum was "for legal services." Scott attacks this "for legal services" response as "offensive," "dishonest," and as creating a "huge windfall" for Knowles. Scott's record citations, however, do not support his rhetoric.

In a separate argument, Scott contends the trial court damages award should be reversed or reduced if this court affirms the trial court finding that Qannu was not a subsidiary of Intelligent. We indeed affirm this finding, but Scott's contention does not follow. Knowles's version of events, accepted by the trial

court, was that ownership of Qannu changed when Lamy and Burford joined Intelligent. Formerly Intelligent owned Qannu, but after the change Knowles owned 60% of Qannu and Scott owned the remaining 40%. Because Knowles is the plaintiff in this case, Scott reasons the transfers from Intelligent to Qannu benefitted Knowles as the 60% owner of Qannu and the court should have discounted its total damage award by this percentage. In other words, Scott argues he should be liable for only 40% of the Qannu debt because he was only a 40% owner of Qannu.

Scott's argument fails in two independent ways. First, Scott cites no legal authority for this argument. Second, Knowles won damages on derivative claims on behalf of Intelligent and not on behalf of Knowles personally. The judgment directed Scott to pay \$557,236 to Intelligent, not to Knowles. From the perspective of Intelligent, its corporate losses were the sums Scott wrongfully transferred from Intelligent to Qannu. From Intelligent's perspective, the ownership of Qannu is immaterial. So too is whether Scott gleaned a personal benefit from these transfers. These transfers were losses to Intelligent, whether or not Scott gained a personal benefit. Scott's attack is unavailing.

C. Substantial evidence supports the finding about transfers to Scott and his family

Scott attacks the trial court's award of \$123,000 in damages for payments Scott made from Intelligent to Scott himself or to trusts affiliated with his family. Substantial evidence supports this \$123,000 damages award. Scott admitted he made these transfers, which he claimed were merely loans. But Scott never obtained member approval, which was required

for such self-interested transactions. These transfers thus were improper self-dealing and breaches of Scott's fiduciary duty.

D. Scott cannot overturn the damages award by identifying different actions that caused no damages

Scott contends some breaches of fiduciary duty the trial court identified did not damage Intelligent. This point is inconsequential because substantial evidence supports the damages the trial court did award. The trial court indeed did identify actions for which it awarded no damages, but this fact does not detract from the propriety of damages the court correctly awarded.

For instance, when Burford discovered improprieties involving Qannu, Scott told Burford not to discuss Qannu with anyone besides Scott. The trial court found this conduct did occur. This finding helped sketch out the context of this case. The fact the trial court did not add a specific damages figure to correspond with this finding, however, does not impeach other damages the trial court determined. The same goes for other findings of this character.

IV. Scott forfeited his complaint about Finkelstein

Scott argues Evidence Code section 1119, which makes mediation statements inadmissible, barred the testimony of one Lew Finkelstein. Knowles points out Scott made no section 1119 objection at trial. Scott does not reply to this point. Scott has forfeited this evidentiary objection by failing to comply with Evidence Code section 353, which states a judgment shall not be reversed by reason of the erroneous admission of evidence unless there appears of record an objection that made clear its specific ground. (Evid. Code, § 353.)

V. The charging and foreclosure orders were valid

Scott complains about a charging order the trial court entered according to section 17705.03 of the Corporations Code. Subdivision (a) provides that, “[o]n application by a *judgment creditor of a member* or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment.” (Italics added.) Scott asserts the statute permits applications only from judgment creditors who are third parties and who are not the company or other members of the company. The statute contains no such limitation, however, and Scott offers no legal authority to support his assertion, which we reject.

Scott also challenges the charging order because Lamy and Burford joined in Knowles’s motion but lacked standing as judgment creditors. In response, Knowles correctly notes the trial court granted the order only as to judgment creditor Intelligent. That the others, apparently acting as amici curiae, joined Knowles’s motion has no significance so long as the outcome of the motion was proper, which it was.

Scott argues the foreclosure sale was improper because Knowles interrupted Intelligent’s practice of making distributions and provided the justification for the foreclosure. Knowles responds that the facts were to the contrary: that Intelligent never made distributions. The record showed Intelligent never had made profit distributions. Substantial evidence supports Knowles’s position and the trial court’s factual determination.

Scott contends the foreclosure sale was improperly advertised and the sale price was too low. Scott has forfeited these factual claims by failing to raise them in the trial court. In

this reply brief, Scott claims he raised these issues in a 2017 ex parte motion, but the record is to the contrary.

VI. The trial properly handled Scott's cross-claim

Scott claimed he was entitled to payments dating from the founding of Intelligent. Substantial evidence supports the trial court's denial of this claim. Scott stated he expected no salary until Intelligent became profitable. The record showed Intelligent never had made profit distributions. Knowles cites this evidence in his respondent's brief. Scott does not reply to this showing. Scott's claim fails.

Scott also claims Knowles, together with Burford and Lamy, breached their fiduciary duties by forming a new entity called AWA Management. Knowles, Burford, and Lamy owned this entity and transferred over \$600,000 of Intelligent's funds to it without Scott's consent. Scott claims this was misappropriation. The trial court found these actions were proper. Knowles, Burford, and Lamy formed AWA to prevent Scott from continuing to access and to freeze Intelligent's funds in improper ways. This evidence is substantial support for the trial court's findings.

DISPOSITION

The judgment is affirmed. Knowles is entitled to costs on appeal. Knowles's motion to dismiss Scott's appeal is dismissed as moot.

WILEY, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

* Associate Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned to Division Seven, by the Chief Justice pursuant to article VI, section 6 of the California Constitution.